

ESTATE OF CHARLES RUNNING BIRD

IBIA 93-9

Decided July 30, 1993

Appeal from an order after rehearing issued by Administrative Law Judge Elmer T. Nitzschke in Indian Probate IP RC 258Z 90-92.

Affirmed.

1. Indian Probate: Evidence: Weight of Evidence--Indian Probate: Children, Illegitimate: Generally

Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses.

2. Indian Probate: Witnesses: Observation by Administrative Law Judge

Where evidence is conflicting, the Board of Indian Appeals normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor.

3. Indian Probate: Appeal: Generally

The burden of proving error in an initial Departmental Indian probate decision is on the party challenging the decision.

APPEARANCES: Krista H. Clark, Esq., Mission, South Dakota, for appellant; Terry L. Pechota, Esq., Rapid City, South Dakota, for appellees.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Phoebe Williams appeals from an order after rehearing issued on August 15, 1992, by Administrative Law Judge Elmer T. Nitzschke in the estate of Charles Running Bird (decedent). For the reasons discussed below, the Board affirms Judge Nitzschke's order.

Background

Decedent was born on October 8, 1924, and died intestate on March 21, 1989, owning trust or restricted interests in property on the Rosebud and Pine Ridge Reservations. The "Data for Heirship Finding and Family History" prepared by the Bureau of Indian Affairs showed that decedent had one child surviving him, Myrna Kay Running Bird/Yellow Hawk.

Judge Nitzschke held hearings to probate decedent's estate on August 16, 1990, and July 17, 1991, at Mission, South Dakota. At the hearings, appellant, who is decedent's sister, contended that Myrna was not decedent's daughter. 1/ The Judge issued an order determining heirs on October 3, 1991, in which he found that Myrna was decedent's daughter by Pauline Wright. Acknowledging that the evidence of Myrna's paternity was conflicting, Judge Nitzschke found that the weight of the evidence supported a finding of paternity, noting, inter alia, that decedent was named on Myrna's birth certificate as her father and had listed himself as Myrna's father when he enrolled her in the Rosebud Sioux Tribe. Further, the Judge stated, his finding was based in part on the demeanor of the witnesses who testified at the hearings.

Appellant filed a petition for rehearing. Judge Nitzschke granted her petition and held a rehearing on May 11, 1992. On August 15, 1992, he confirmed his original order, stating in part:

The rehearing in this matter has not produced sufficient new evidence to support a conclusion that the decedent was not the father of Myrna Running Bird/Yellow Hawk.

Decedent acknowledged in writing that he was Myrna's father when he registered her birth and when he signed the application enrolling Myrna as a member of the Rosebud Sioux Tribe. This written acknowledgment by the decedent as to paternity of Myrna is given great weight. Estate of Henry W. George, 15 IBIA 49 (1986). The actions of the decedent in living with Myrna's mother from the time of Myrna's birth and raising Myrna as his daughter until she became an adult is consistent with a finding of paternity.

While there is some evidence that the decedent did not begin living with Myrna's mother until six months before Myrna's birth, there has been no evidence presented to show that the decedent did not have access to Myrna's mother at the time of conception.

* * * * *

1/ Myrna attended the first hearing but died before the second hearing. She was survived by two children, Lavita Running Bird and Joseph Running Bird, who are appellees here.

The lack of marriage between the decedent and Myrna's mother does not prevent the right to inherit but it may have given rise to Myrna questioning her paternity particularly in light of the arguments testified to that took place between decedent and his sister and decedent's sister and Myrna's mother.

Testimony by decedent's sister, her daughter and son-in-law that decedent admitted to them his fatherhood of Myrna was based on pity not blood, though hearsay is admissible in this proceeding. Estate of Henry W. George * * *. The fact that these witnesses would benefit from a finding that decedent was not the father of Myrna is also considered in evaluating this evidence.

The testimony by store owner, Roy Fuerst, that when quizzing the decedent about the paternity of Myrna he advised that she really wasn't his but claimed her is also admissible and has been given consideration. In considering this testimony along with that of others who testified similarly, I find such evidence does not overcome the evidence in support of a finding of paternity.

(Aug. 15, 1992, Order at 2-3).

Appellant's notice of appeal from this order was received by the Board on October 20, 1992. Both appellant and appellees filed briefs.

Discussion and Conclusions

Appellant argues that Judge Nitzschke erred in weighing the evidence concerning decedent's paternity of Myrna. She contends, in essence, that the Judge should have given more weight to her own testimony and that of her witnesses and less weight to decedent's written acknowledgments of paternity and the testimony in support of his paternity of Myrna.

The evidence before Judge Nitzschke was conflicting. It is apparent from his two orders that he took a number of factors into consideration. One important consideration was that decedent had acknowledged his paternity of Myrna in writing. Appellant does not dispute the fact that decedent signed both Myrna's birth certificate and her tribal enrollment application as her father. 2/ Appellant contends, however, that decedent signed those documents out of kindness or pity or because he was coerced into signing them, but not because he was in fact Myrna's father.

2/ On the copy of Myrna's birth certificate included in the record, the word "Unknown" is typed in the space for "Father of child." The typed word is crossed out, and decedent's name is written in by hand. A signature "Charles Running Bird" also appears on the same line. The signature matches other examples of decedent's signature which appear throughout the record. The date of decedent's signature cannot be determined.

Decedent signed Myrna's tribal enrollment application on Sept. 22, 1960, when Myrna was 9 months old.

[1] Written acknowledgments of paternity, especially those signed at a time reasonably contemporaneous with the child's birth, are persuasive evidence of paternity and are generally to be given greater weight than the recollections of witnesses. E.g., Estate of Henry W. George, supra, 15 IBIA at 52 ("The existence of documentary evidence, and especially of a written acknowledgment of paternity, makes a paternity determination much easier, [even though] such evidence is not a prerequisite for a finding of paternity"); Estate of Willard Guy, 13 IBIA 252, 255 (1985) (Where testimony concerning paternity is conflicting, "in the absence of persuasive evidence of falsification or error, contemporaneous documents should be given great weight in determining the facts they are intended to memorialize").

Appellant, in effect, alleges falsification of the documents by decedent. However, she offers only the most general description of an incident allegedly concerning one of the documents and otherwise contends that doubt is cast upon the documents by some of decedent's later statements. ^{3/} Appellant's statements are not persuasive evidence that decedent falsified the documents. In fact, appellant's incomplete recollection of the incident she described is an example of the reason why documentary evidence is normally preferred over the memory of witnesses. The Board finds that Judge Nitzschke properly gave "great weight" to decedent's written acknowledgments of paternity.

[2] Because of the conflicts in the testimony before him, Judge Nitzschke based his decision in part upon the credibility of the witnesses, taking into account both their interests in the outcome of the case and their demeanor as they testified. When evidence is conflicting, the Board normally will not disturb a decision based upon findings of credibility when the Administrative Law Judge had an opportunity to hear the witnesses and to observe their demeanor. E.g., Estate of Donald Paul Lafferty, 19 IBIA 90 (1990); Estate of George Neconie, 16 IBIA 120 (1988).

[3] It is well established that the burden of proving error in the initial Departmental Indian probate decision is on the party challenging the decision. Lafferty, and cases cited therein. Appellant has not carried her burden in this case.

^{3/} Appellant states in her brief before the Board:

"[Appellant] testified at the October [sic, should be July], 1991, hearing that she recalled a letter arriving with a paper in it which [decedent] reluctantly signed after he learned that Pauline Wright's husband Jesse Wright did not want his name on Myrna's birth certificate. * * * At the May, 1992, hearing [appellant] again testified about the circumstances of her brother signing a document concerning Myrna's paternity and her belief that he was coerced into doing so, although the exact circumstances of that are vague. * * * Thus although [decedent] did at some point early in Myrna's life claim that he was her natural father, doubt is cast on whether [decedent] did so, as he himself later stated, because he 'pitied' her because she had no father, rather than because he really was her father" (Appellant's Brief at 8).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Nitzschke's August 15, 1992, order is affirmed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge